

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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4	ePLUS, INC.,	:	
5		:	
6	Plaintiff,	:	
7	v.	:	Civil Action
8		:	No. 3:09CV620
9	LAWSON SOFTWARE, INC.,	:	
10		:	March 26, 2010
11	Defendant.	:	
12	---	:	

COMPLETE TRANSCRIPT OF **CONFERENCE CALL**
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES: (All via telephone)

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1 (The proceedings in this matter commenced at
2 10:50 a.m.)

3 THE COURT: Hello.

4 UNIDENTIFIED SPEAKER: Hello, Judge Payne.

5 THE COURT: All right. This is ePlus, Inc.
6 against Lawson Software, Civil No. 3:09CV620.

7 Let me have a roll call. Counsel for the
8 plaintiffs start, and every time you talk, give your
9 name.

10 MR. MERRITT: Craig Merritt and Henry Willett
11 with Christian and Barton for ePlus.

12 MR. ROBERTSON: Scott Robertson with Goodwin
13 Procter for ePlus.

14 MR. CARR: Dabney Carr with Troutman Sanders
15 for Lawson Software.

16 MR. McDONALD: Daniel McDonald and Josh
17 Graham for Lawson Software, Your Honor.

18 THE COURT: All right. We have a motion to
19 compel that's been filed by Lawson.

20 MR. McDONALD: Yes, Your Honor. This is Dan
21 McDonald speaking. It has been fully briefed. So
22 maybe I'll start by asking if the Court has any
23 questions to start with?

24 THE COURT: Yes. The question I have is why
25 can't you-all get this straightened out? I don't

1 understand the difficulty here. This nonsense,
2 Mr. Robertson, about who's got the burden of proof is
3 irrelevant to how well you answered discovery. And I
4 don't think we need to spend any time on that.

5 MR. McDONALD: We agree. We think we've
6 given them a lot of detail. They know exactly what
7 we're asking. We think we should get an answer very
8 soon.

9 UNIDENTIFIED SPEAKER: Well, if I can address
10 some of the problems that I perceive.

11 THE COURT: Give your name, please.

12 MR. ROBERTSON: This is Scott Robertson. I'm
13 sorry, sir.

14 Well, first, Judge, you may recall when we
15 had our pretrial conference, the Court pushed on ePlus
16 to narrow the number of claims that it was going to be
17 asserting in the case, and at the same time it pushed
18 on Lawson to narrow the number of references. And at
19 the time I'm referring to the November 13 transcript.
20 It's at page 33 and 34. Counsel for Lawson indicated
21 that it was going to narrow the number of references,
22 and it said, "If the jury and judge don't buy prior
23 art one through eight, I'm pretty sure they won't buy
24 number nine. I'll figure it out by Monday and have
25 the number nine or ten."

1 And then counsel represented that when the
2 Court pressed, "Well, when are you going to do it?"
3 He said, "Next week is reasonable. I think we'll
4 basically stick with what we've done."

5 Sometime later in December we got invalidity
6 contentions that were under the Court's scheduling
7 order at the time. It wasn't signed, but the parties
8 were adhering to it as if the order had been signed.
9 The order actually required that the defendant do a
10 complete and detailed explanation of what it alleges
11 that each listed prior art reference shows on a
12 claim-by-claim form, element-by-element basis, and how
13 the prior art invalidates the claim asserted by the
14 plaintiff.

15 What I have now, Your Honor, and if you will
16 just refer to perhaps page 4 of the motion, the
17 memorandum in support, interrogatory 19 now starts to
18 expand where it's supposed to be 7, 8 or 9 references,
19 it's something like 28 references. And then if you go
20 back on to page 5 and 6, I think there's now some 36
21 combinations that they are alleging. And the
22 allegations include things like the SABRE system or
23 the P.O. Writer system. I have no idea what they mean
24 when they're talking about "a system" or what theory
25 they are proceeding under when they put together these

1 claim charts.

2 For example, Your Honor, as Your Honor well
3 knows, Section 102 anticipation and Section 103
4 obviousness are two very separate inquiries under the
5 law and have different approaches. Within Section
6 102, for instance, anticipation, for example, you can
7 proceed under printed publication theory, which
8 requires that all of the claimed elements be in a
9 single printed publication prior art reference, an on
10 sale bar, a prior public use, a patent, for example.
11 But when you do that and what the Court's order
12 required is if they are going to do it on a
13 claim-by-claim element basis, they should explain
14 exactly where it is and what the combination is.

15 If I can just give you one of my poster
16 children, for example, Your Honor. I'm looking at
17 their claim charts, and this was with respect to just
18 one claim element. It had nine separate references,
19 and within each nine, I was going to give you an
20 example, they say, The SABRE system is an electronic
21 sourcing system. SABRE renders Claim 1 obvious when
22 combined with either the Fisher RIMS system, U.S.
23 Patent No. 5,694,551, the J-CON system, the IBM 2
24 system, or apparently all of the above. And that's
25 just one out of nine separate references.

1 If you look at the permutations alone, Your
2 Honor, we're talking literally tens of thousands of
3 different permutations where I'm supposed to figure
4 out what they mean by a so-called system, what they
5 are specifically referencing it to. Are they
6 intending on bringing third party witnesses to enhance
7 and embellish on what the system is? I've been asking
8 that for months because I want to depose any third
9 parties, but they have never told me.

10 When they lump something together and say
11 then it renders it invalid under 102/103, and then
12 have a laundry list of about nine separate references,
13 what am I to infer from that?

14 THE COURT: What you're supposed to do is
15 object that they haven't complied with the Court order
16 and tell them that they haven't. And then if they
17 don't comply, bring it to the Court for decision on
18 that front instead of arguing about it.

19 Look, you, Mr. McDonald, have gone hog wild
20 and crazy with these references, and they are
21 inadequate. They just are. I've never seen any prior
22 art references, alleged invalidity references, as
23 crazy as this.

24 You're just going to have to pick --

25 MR. McDONALD: Well, Your Honor --

1 THE COURT: Wait a minute, Mr. McDonald. You
2 told me you were going to have seven or eight, and I
3 want you to do them like I said; claim-by-claim,
4 element-by-element. What is it that in the prior art
5 invalidates it? And then you take the page of the
6 prior art, and not only do you write it out, you
7 highlight it, and you hand it to them.

8 They don't have to answer anything until you
9 start doing it right and until you cut down your
10 references and make them specific. It's not
11 sufficient to tell somebody some saber system or some
12 whatever it is. I know that you said that you all
13 gave them the page number, but that's not enough.
14 That doesn't do what I asked you to do. You-all have
15 complicated the case unnecessarily.

16 MR. McDONALD: Beyond the page number, I put
17 the tabs in, Your Honor, which is more specific than
18 page number. We have column and line references
19 specifically to the tab.

20 THE COURT: But you didn't do it on a
21 claim-by-claim, element-by-element basis.

22 MR. McDONALD: That's Exhibit A, Your Honor,
23 to what we provided to you. It's a copy of our
24 invalidity contentions. And that's exactly what we
25 did. We have examples in there. We provided excerpts

1 of the 117 pages of charts where we did go
2 element-by-element, claim-by-claim, and page and
3 column, and line number by line number.

4 Yes, there are some references to saber
5 system. That's true. But what we have asked for in
6 this motion --

7 THE COURT: Well, you're not going to get
8 anything else. Okay? Until you straighten yourself
9 out, you're not getting anything else. That's the end
10 of it. I'm denying your motion because I think
11 you-all have gone off the deep end, and you-all have
12 not gotten this thing organized the way it needs to
13 get organized.

14 You came here and told me you were going to
15 do a very few number of prior art references, and you
16 come up with this general references, and I don't
17 think you've done it right.

18 Now, the next issue.

19 MR. ROBERTSON: This is Scott Robinson. They
20 are insisting that we apply our infringement analysis
21 to a proposed claim construction. And they haven't
22 done that with respect to the invalidity issues. I
23 don't care if they use their claim construction or our
24 claim construction or both, but I think it should be
25 references --

1 THE COURT: Wait a minute. I don't even know
2 what you're talking about now. We're going on to the
3 next issue. I've already dealt with their motion to
4 compel. It's denied until they can straighten things
5 out.

6 The next one is financial information.
7 What's the deal on that? What's the problem on that?

8 MR. McDONALD: Your Honor, we have given them
9 a letter responsive as we continue to talk about this
10 issue just this morning, and we promised to supplement
11 by April 15, which I think is the date they asked for.
12 So I think that one is resolved.

13 THE COURT: All right. I don't know what
14 you're doing, but the bottom line is you're supposed
15 to give them detailed financial information so they
16 can figure out what you have made and what you have
17 done with the infringing products.

18 MR. McDONALD: That's right, Your Honor. We
19 don't have any objections to that. It's just a matter
20 of knowing exactly what they want so we can get it to
21 them. We now understand that and we're going to get
22 it to them.

23 MR. ROBERTSON: Your Honor, that letter came
24 in at 10:20 this morning, and I haven't even had an
25 opportunity to look at it, but I will take

1 Mr. McDonald at his word and look at it. We've been
2 asking for this for months. We have expert reports
3 coming up. We'd just like to get this done and have
4 the financial information we need for it. So thank
5 you.

6 I think, given Mr. McDonald's
7 representations, there's some inconsistencies in some
8 of the charts they provided. And I understand they
9 are trying to run that to ground.

10 Mr. McDonald, was that part of your letter to
11 me this morning?

12 MR. McDONALD: Yes. That's really -- almost
13 all of the letter is explaining to you where it looked
14 like something was inconsistent, explains and
15 reconciles the data that you have.

16 MR. ROBERTSON: All right. Well, I'll take a
17 look at that, and hopefully that resolves the matters,
18 and we can move forward.

19 THE COURT: Well, you-all better resolve it
20 and move forward.

21 What's this Lawson's responses to
22 interrogatories 21 through 23? What's this about?

23 MR. ROBERTSON: Your Honor, the problem we
24 have is they were answered pursuant to Rule 33D. I
25 think the Court made clear at I believe it was at the

1 second pretrial conference we had that if you were
2 going to answer with Rule 33(d), that the burden was
3 not the same for the party receiving the documents as
4 to what the party that was the custodian of the
5 documents.

6 We think some of these interrogatories call
7 for a clear narrative response. For example,
8 interrogatory No. 22 asks for identification of
9 essentially suppliers of catalog content. One of
10 Lawson's defenses has been, and I've heard this
11 several times, is "We really don't do catalogs.
12 Sometimes we hire subcontractors who might provide
13 catalog services or sometimes our customers actually
14 load the catalogs. So we're really not doing that."

15 We don't believe that's a defense, but we
16 think we're entitled to know, you know, if you do have
17 subcontractors, like they represented Sciquest who was
18 a defendant in this case was one, we want to know who
19 they are.

20 Now, after giving us just Rule 33(d) base
21 ranges, we've look at the documents. Many of them are
22 nonresponsive. It should be easy for them since they
23 made this representative several times to simply
24 identify these people for us.

25 THE COURT: Mr. McDonald, interrogatory 22,

1 what about that?

2 MR. McDONALD: Interrogatory 22 doesn't say
3 anything about catalogs, subcontractors. Your Honor,
4 it says, Identify all online supplier sites, eCommerce
5 hubs, digital marketplaces, supplier networks, etc.

6 MR. ROBERTSON: Sorry, Mr. McDonald. You
7 finished. It said supplier catalogs and supplier
8 portals ever accessed by integrated Web or linked to
9 or used in connection with Lawson's sourcing and
10 procurement system.

11 So all these things you know are sources of
12 catalog content. Every single one. eCommerce hubs,
13 your punchout site, and catalog suppliers. And you
14 stop reading right before you got to supplier catalogs
15 and supplier portals.

16 THE COURT: Mr. Robertson, it would be a good
17 idea to let him finish before you interrupt.

18 MR. ROBERTSON: Okay. Thank you, sir.

19 MR. McDONALD: This is Mr. McDonald speaking
20 again, Your Honor.

21 Mr. Robertson did go on to read the rest of
22 the interrogatory, and it doesn't say anything about
23 subcontractors. And this is part of the problem, I
24 think, with how this was going to rush to the Court at
25 this point. We're not sure what they're asking for.

1 He skipped over interrogatory No. 21. It's several
2 lines, and I'm not going to read the whole thing, and
3 if Mr. Robertson wants to add anything, fine. But it
4 starts off, "Identify all agreements, contracts,
5 requests for proposals, responses to requests for
6 proposals."

7 It goes on to identify a category of
8 documents. So that's what we've provided. This one
9 was a very appropriate one for a Rule 33(d) request
10 because they are asking for documents, agreements,
11 contracts, etc.

12 He skips over that one. So now we have this
13 22, Identify the supplier sites and things like that.
14 Well, now he's saying he wants to know about who did
15 subcontracting for us. And that's an issue I think we
16 can work out and give them a narrative answer. I
17 don't think we have anybody like that. That's a
18 specific question that's not in interrogatory No. 22.

19 If we just sat down and talked about it, I
20 think we can give them what he's looking for. But
21 what he's talking about on the phone is not what
22 interrogatory 22 says.

23 MR. ROBERTSON: This is Mr. Robertson.

24 Interrogatory No. 22 says identify any of
25 these people. Interrogatory No. 23 says, Please

1 provide was the contracts you have with these people.
2 Statements of work, agreements, any licenses, that
3 kind of thing. So 22 was simply saying, Tell us who
4 they are. And 23 says, Give us the contracts and tell
5 us what contracts you have with them.

6 THE COURT: You're not objecting to No. 21
7 then?

8 MR. McDONALD: Mr. Robertson, I think, is
9 getting the numbers screwed up. This is Mr. McDonald
10 speaking. No 21 is the one about identifying
11 agreements.

12 THE COURT: Wait just a minute. He said this
13 letter says interrogatories 21, 22 and 23.

14 MR. McDONALD: Right. 21 is about
15 identifying agreements, and it doesn't relate to
16 supplier sites or subcontractors. This relates to --

17 THE COURT: My question is: Do you really
18 object? Do you have a problem with that one,
19 Mr. Robertson?

20 MR. McDONALD: Oh, no. That's not the issue.

21 THE COURT: No, no.

22 A VOICE: He's asking Scott.

23 MR. McDONALD: Oh, I'm sorry.

24 THE COURT: Mr. Robertson, wait. All of you
25 slow down. You-all are all adrenalized here.

1 Is there still any issue on interrogatory
2 No. 21 response by Lawson?

3 MR. McDONALD: Are you asking Robertson?

4 THE COURT: Robertson. Yes or no?

5 MR. ROBERTSON: I need a supplementation,
6 Your Honor, because the last time it was asked it was
7 October of '09, and there have been thousands of pages
8 of documents that have since come in.

9 If they are responsive and he wants to rely
10 on Rule 33(d), I would just like an update identifying
11 these additional agreements.

12 THE COURT: Stop. Do you have any problem
13 with that, Mr. McDonald?

14 MR. McDONALD: No, Your Honor. We thought we
15 had already agreed to do that.

16 THE COURT: Done. Okay.

17 Now, 22 and 23, anything else, Mr. Robertson?

18 MR. ROBERTSON: We'd just like them to
19 identify these suppliers of catalog content, wherever
20 it comes from, and then if they have any agreements
21 with them, which is No. 23.

22 THE COURT: All right. And that can be done
23 and should be done in the textual answer, not by just
24 throwing a bunch of documents on the table.

25 Interrogatory No. 24, Lawson's response.

1 Have you all gotten that straightened out now or not,
2 Mr. Robertson?

3 MR. ROBERTSON: I don't believe we have, Your
4 Honor.

5 THE COURT: What is it?

6 MR. ROBERTSON: We've asked for them to
7 identify an implementation of these accused software
8 modules. As you may recall, Your Honor, they grouped
9 together. There's a requisition module and a purchase
10 order module.

11 Lawson is contending that we have to prove
12 infringement on a customer-by-customer basis and that
13 the software that they have licensed or maintained is
14 actual, quote, implemented.

15 We think this interrogatory directly
16 addresses that issue and they believe that it doesn't
17 fairly address the issue. They have asked us to serve
18 another interrogatory. We think it's covered by this
19 interrogatory. If it's going to be the basis of their
20 defense, we think that they should provide us the
21 information as to which software modules on a
22 customer-by-customer basis it actually implemented.

23 I think a new interrogatory is just going to
24 further delay things when we have deadlines coming up.

25 THE COURT: Mr. McDonald.

1 MR. McDONALD: Interrogatory No. 24 basically
2 asks for three things: To identify
3 customer-by-customer which software modules that
4 particular customer got. We gave them that.

5 Second, it asked for the dates and periods of
6 time during which the systems were sold or licensed to
7 those customers. We gave them the dates.

8 Third, it asked for the residue attributable
9 to each customer. We gave them that. And when
10 Mr. Robertson says he wants to know about
11 implementation, I just don't understand what he's
12 asking for, and we just need clarification on what
13 else he wants that we haven't given him.

14 THE COURT: I don't have the interrogatory in
15 front of me. What does it read?

16 MR. ROBERTSON: Well, Your Honor, again, Mr.
17 McDonald paraphrased. It does ask for the accused
18 module.

19 THE COURT: Wait a minute. Read it to me.

20 MR. ROBERTSON: Identify, on a
21 customer-by-customer basis for each Lawson customer,
22 from May 2003 until the present, the accused period,
23 the modules of Lawson's S3 Supply Chain Management
24 Suite and/or M3 Supply Chain Management Suite, those
25 are the accused products, Your Honor, which Lawson has

1 made, used, sold, offered for sale, imported,
2 licensed, implemented, maintained, and/or serviced
3 for/to each such customer, and/or which modules such
4 customers used, purchased, licensed, implemented or
5 had implemented, maintained or had maintained, or
6 serviced or had serviced.

7 We think it clearly covers implementation.
8 I've been at depositions, Your Honor, where they are
9 claiming simply because the software was sold and
10 maintained by them, but it's not implemented, that
11 that's not an infringing sale. We disagree on that,
12 but if that's the basis of a defense that a customer
13 who acquires it may not implement some aspect of it,
14 we'd like to know on a customer-by-customer basis what
15 that is.

16 According to them, it impacts our
17 infringement case. Obviously, if it impacts that, it
18 impacts our damages case. If they are no longer
19 maintaining that implementation is necessary, then I
20 just ask -- that they don't need to provide it. Then
21 maybe we'll just ask for a ruling that that wouldn't
22 be a defense at trial.

23 THE COURT: Well, if they don't provide it,
24 they can't raise it at trial anyway.

25 Sometimes, you know, you can't get all the

1 rulings ahead of time. You kind of have to wait and
2 see what happens in the course of the case. And if
3 somebody doesn't give you the information in discovery
4 that you ask for that's pertinent to their defense and
5 they want to raise it, you say, I want to move the
6 strike the defense because they said we weren't
7 entitled to this and they didn't give it to us. Then
8 wham, the door is shut on it. That's part of
9 practicing law is knowing how to do that stuff.

10 Is implementation by the customer any longer
11 asserted, Mr. McDonald, as necessary before
12 infringement can occur?

13 MR. McDONALD: I'm not sure what the word
14 "implementation" means here, Your Honor. What I think
15 he may be talking about is when specific situations
16 have come up, for example, where third party customers
17 that ePlus deposed either said they didn't implement
18 certain modules or features that were in the product.
19 That might be one category he might be talking about.

20 Another one has to do with when they load up
21 the data, where do they get it from? Does Lawson load
22 the data up for them or not? If that's what he means
23 by implementation, those are certainly still relevant
24 issues, Your Honor, but the word "implementation" just
25 isn't very clear to me in terms of what exactly that

1 Mr. Robertson is asking us to do.

2 THE COURT: When were these interrogatories
3 filed, Mr. Robertson?

4 MR. ROBERTSON: I believe -- I think it
5 was -- I'm not sure, Your Honor. I think it was
6 October of 2009. It's been several months.

7 THE COURT: Well, it's too late to be asking
8 that. If you didn't understand that word, you should
9 have asked about that back a long time ago. Answer
10 the interrogatory.

11 I, frankly, don't understand how it is a
12 defense to infringement to say you sold Payne
13 something, but Payne didn't use all of it. If you
14 sold it to me, that's an infringement, it seems to me.
15 So I don't really understand the issue, but you-all
16 know enough and you can use the dictionaries to get
17 your definitions. Answer it.

18 All right. That takes care of everything
19 that you all have got pending right know, doesn't it?

20 MR. ROBERTSON: Well, Your Honor, we had one
21 issue with respect to non-infringement contentions,
22 but I think we can work that out with Lawson.

23 THE COURT: Good. That will be good.

24 All right. Now, I don't know if there's
25 enough time in my lifetime and yours to try a case

1 with 28 prior art references that are described as
2 generally as these are and with 30-something different
3 combinations that are as vague as these are.

4 So you-all are going to have to get yourself
5 straight there or you're going to end up with no prior
6 art defense. That's what's going to happen to you.

7 So I suggest you work out a way to get that
8 sorted out and focus on what's really at issue, get it
9 on the table, and get it straightened out. And I
10 would suggest that, if I were you, I'd do that
11 immediately because you've got expert reports coming
12 up, and your time is running on you-all.

13 Mr. Robertson, have you given any more
14 thought to narrowing your claims further now that
15 discovery has been underway?

16 MR. ROBERTSON: I'll certainly give it some
17 thought, Your Honor. I think many of the elements are
18 similar in the different claims. So I've never had a
19 problem putting on an infringement case before in less
20 than two and a half days.

21 Quite frankly, Judge, with the Markman ruling
22 still out there, it's hard for me to make an informed
23 decision. I'm not faulting the Court. Obviously, the
24 parties are working diligently to try to get you the
25 information we need, but that's where I find myself,

1 sir.

2 THE COURT: That briefing is going to be
3 finished or has it been finished now?

4 MR. ROBERTSON: It will be finished on
5 Monday, Your Honor.

6 THE COURT: Monday. All right. Thank you.

7 MR. ROBERTSON: Thank you, Your Honor.

8 THE COURT: You-all take care. Bye.

9
10 (The proceedings were adjourned at 11:16
11 a.m.)

12 I, Diane J. Daffron, certify that the
13 foregoing is a true and accurate transcription of my
14 stenographic notes.

15 /s/ 3/30/10
16 _____
17 DIANE J. DAFFRON, RPR, CCR DATE

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